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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GILDARDO BARRAZA, Defendant and Appellant.	B221793 (Los Angeles County Super. Ct. No. KA087185)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles Horan, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Shira B. Seigle, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Pursuant to a plea agreement, defendant and appellant Gildardo Barraza (defendant) pleaded no contest to possession for sale of a controlled substance. The trial court sentenced defendant to six years in state prison. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence. Defendant also requests that we review the sealed transcripts of an in camera hearing regarding a privilege claim asserted by the Pomona City Police Department to determine if the trial court abused its discretion in upholding the privilege claim. We affirm the trial court's denial of the suppression motion and its decision upholding the privilege claim.

PROCEDURAL BACKGROUND

The District Attorney of Los Angeles County filed an information charging defendant with possession for sale of a controlled substance, in violation of Health & Safety Code, section 11378, and transportation of a controlled substance, in violation of Health & Safety Code, section 11379, subdivision (a). The District Attorney also alleged that defendant had a prior conviction for a serious or violent felony within the meaning of Penal Code, sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i),[1] had served two prison terms within the meaning of section 667.5, subdivision (b), and had a drug-related conviction within the meaning of Health and Safety Code, section 11370.2, subdivision (c). Defendant pleaded not guilty and denied the allegations.

Defendant filed a motion to suppress evidence under section 1538.5, contending the search was improper. The trial court heard and denied the motion. During the hearing on defendant's motion to suppress evidence, the trial court held an in camera hearing regarding the arresting officer's assertion that certain information was privileged under Evidence Code sections 1040 and 1041. The trial court ruled that the information was privileged.

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[1] All statutory references are to the Penal Code unless otherwise stated.

Pursuant to a plea agreement, defendant pleaded no contest to possession for sale of a controlled substance (Health & Saf. Code, § 11378) and admitted all of the allegations regarding his prior convictions. The trial court sentenced defendant to six years in state prison. The trial court allowed defendant to withdraw his admissions to the prior prison term allegations and the prior drug-related conviction, and ordered them stricken. The charge for transportation of a controlled substance (Health & Saf. Code, § 11379, subd (a)) was dismissed.

DISCUSSION

I. The Motion to Suppress

Defendant contends the scope of the arresting officer's search of the car exceeded the scope of defendant's consent to search. We hold that the scope of the search was objectively reasonable.

A. Standard of Review

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

B. Background

1. Prosecution's Case

Pomona City Police Department Sergeant Jaime Gutierrez testified that about 6:45 p.m. on June 1, 2009, he was on duty in a marked patrol car. He saw defendant, who was driving a Lexus, stop at an intersection with his tires over the intersection limit line.

Sergeant Gutierrez conducted a traffic stop of defendant's vehicle. Prior to the stop, Sergeant Gutierrez had received information that defendant was involved in some type of illegal activity. Sergeant Gutierrez asserted that the information was privileged under Evidence Code, sections 1040 and 1041.

Sergeant Gutierrez approached the car driven by defendant, and asked defendant for his driver's license, registration, and proof of insurance. Defendant partially complied, but told Sergeant Gutierrez he could not find his registration. Sergeant Gutierrez asked defendant to step out of the car and performed a consensual pat-down search of defendant.

Sergeant Gutierrez then asked defendant if he had "anything illegal in the car, narcotics, weapons." Defendant replied that "he did not. Go ahead and search, there shouldn't be anything in there." Defendant did not tell Sergeant Gutierrez that he could not search in certain areas of the car, nor did Sergeant Gutierrez indicate that his search was going to be limited to certain areas.

Sergeant Gutierrez had defendant sit on the curb, and began searching the car. At that point, defendant mentioned that the car belonged to his sister. Sergeant Gutierrez did not remember defendant saying that defendant could not give permission to search the car.

When Sergeant Gutierrez searched the glove compartment on the passenger's side, he found the registration to the car "lodged in between the back of the glove box and like a subwall or a fire wall area." Sergeant Gutierrez stated that the position of the registration indicated that the glove compartment had been used recently. Sergeant Gutierrez knew that the particular model of Lexus defendant was driving had "a factory compartment back there [behind the glove compartment] where a filter is housed, which [had] a void where narcotics [could] be stored." When Sergeant Gutierrez pulled out the registration, he noticed the "little [plastic] panel [covering in the back of the glove compartment] was loose." Within two seconds, and without the use of any tools, Sergeant Gutierrez pulled the panel down and popped it off, pulled the filter out, and found inside the void three bags of methamphetamine and a digital scale.

Sergeant Gutierrez did not damage the panel or the filter in removing them. Those items were restored to their original position as easily as Sergeant Gutierrez had pulled them out. The entire encounter, including the traffic stop and subsequent search, lasted between 10 and 20 minutes.

2. Defense Case

Defendant testified on his own behalf to the following facts. Defendant noticed that Sergeant Gutierrez was behind him and, when defendant came to the stop sign, he stopped a few feet before the intersection line. Defendant did so because he did not "want to get pulled over for a . . . traffic violation." Defendant provided Sergeant Gutierrez with his driver's license and proof of insurance. Because it was taking too long for defendant to find the car registration, Sergeant Gutierrez asked him to step out of the car. Sergeant Gutierrez never told defendant why he was stopped. Defendant consented to a pat-down search.

Sergeant Gutierrez then asked defendant whose car he was driving, and defendant replied that it was his sister's car. When Sergeant Gutierrez asked if he could search the car, defendant replied that he was not able to give Sergeant Gutierrez permission to search the car because it was not defendant's car. Sergeant Gutierrez repeated his request to search, and defendant repeated that he could not give permission to search the car because it was not his car. Sergeant Gutierrez then asked defendant "Why don't you let me search it?" Defendant answered, "Because it's not my vehicle. I can't give you permission for something that doesn't belong to me." Sergeant Gutierrez said, "So, you're telling me no, right?," and defendant confirmed he was saying no.

Sergeant Gutierrez nevertheless searched the car. Sergeant Gutierrez searched the car two or three times, and between the searches, Sergeant Gutierrez asked defendant if there were any illegal weapons or drugs in the car. Defendant said, "I have no knowledge of anything; it's not my vehicle."

Defendant used the car two to three times per week. He had used the glove compartment searched by Sergeant Gutierrez on prior occasions. Defendant placed

papers in the glove compartment, including the car registration, and defendant placed income tax papers in it at least six months prior to the search. He opened the glove compartment at the time of the traffic stop in an attempt to access the car registration, and the glove compartment remained open throughout the search.

3. The Trial Court's Ruling

Defendant filed a motion to suppress evidence under section 1538.5, contending the search in the area behind the glove compartment was improper. In denying defendant's motion to suppress, the trial court stated, "Now, in terms of the legality of the search in the case. Step 1, was the stop justified based upon the defendant not obeying the vehicle code laws? That's the only ground set forth by the People, and that is the only ground upon which this court is ruling. The answer is yes, it was a justified stop. The court rules based upon listening to and watching both the prosecution witnesses and the defendant as they testified. My credibility call is yes. The [wheels of the car driven by] defendant . . . passed the limit line. That was exploited by the officer who, as defense counsel correctly argues, had independent reasons and grounds for wishing to search the vehicle. The stop was valid."

The trial court continued, "The court has no doubt whatsoever that the defendant did, in fact, consent to a search of the vehicle, and quite candidly, that often happens. I think in this case it is certainly understandable by the way in which the drugs were concealed and secreted within the car. I don't find it unusual, or anything close to it, to believe that a defendant, when asked by an officer that he knows, 'Hey, can I look for drugs or weapons' is going to say yes, especially when he believes those drugs have been successfully concealed. They were quite well concealed within the vehicle, behind the glove box. So there was a valid consent."

The trial court stated further, "The next issue becomes, well, does the scope of the consent extend to the area behind the glove box? Absolutely yes. There were no constraints placed on the consent, either at the time it was given or during the search as it proceeded. Certainly a defendant is in a position at any time he wants to withdraw his

consent, or to limit its scope, according to the Supreme Court. There was no request to do so this case at all. [¶] . . . [¶] The merits are it is a lawful stop, a lawful consent, a lawful search, and a lawful recovery of evidence. Therefore, the motion is denied."

4. Legal Principles

"Consent to a search is a recognized exception to the Fourth Amendment's warrant requirement." (*People v. Cantor* (2007) 149 Cal.App.4th 961, 965; *People v. James* (1977) 19 Cal.3d 99, 106.) The trial court's findings on the issue of consent, whether express or implied, will be upheld on appeal if supported by substantial evidence. (*People v. James*, *supra*, 19 Cal.3d at p. 107.)

"'A consensual search may not legally exceed the scope of the consent supporting it. [Citation.]'" (*People v. Baker* (2008) 164 Cal.App.4th 1152, 1158; *People v. Cantor*, *supra*, 149 Cal.App.4th at p. 965.) "'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" (*People v. Cantor*, *supra*, 149 Cal.App.4th at p. 965, quoting *Florida v. Jimeno* (1991) 500 U.S. 248, 251.) "'Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of circumstances. [Citation.]'" (*People v. Baker*, *supra*, 164 Cal.App.4th at p. 1158.) "'Unless clearly erroneous, we uphold the trial court's determination.'" (*People v. Cantor*, *supra*, 149 Cal.App.4th at p. 965.)

At the suppression hearing, Sergeant Gutierrez testified that defendant consented to the search of the vehicle. In contrast, defendant testified that Sergeant Gutierrez repeatedly asked him for consent to search the vehicle and defendant repeatedly denied his consent, but Sergeant Gutierrez searched the car anyway. The trial court found defendant's hearing testimony was not credible and rejected the entirety of his account. The court's factual findings are supported by substantial evidence. (*People v. Glaser*, *supra*, 11 Cal.4th at p. 362.) We must accept the trial court's factual findings and

credibility determination, if they are supported by substantial evidence. (*People v. Danks* (2004) 32 Cal.4th 269, 304.)

Sergeant Gutierrez asked defendant if he had any narcotics in the car, defendant replied that "he did not. Go ahead and search, there shouldn't be anything in there." Defendant did not tell Sergeant Gutierrez that he could not search in certain areas of the car, nor did Sergeant Gutierrez say his search was going to be limited to certain areas. According to Sergeant Gutierrez, the search consent was open-ended. "[O]pen-ended consent to search normally does not suggest that the person consenting would expect the search to be limited in any way, and that a general consent to search includes consent to pursue the stated object of the search by opening closed containers." (*People v. Jenkins*, *supra,* 22 Cal.4th at p. 975; *Florida v. Jimeno*, *supra*, 500 U.S. at pp. 249-250.) It is objectively reasonable that defendant understood his consent to extend to a search of the compartment in back of the glove compartment which was covered by a small plastic panel. The glove compartment was open throughout the search, and the panel in the back was loose and popped off in seconds without the use of any tool and without causing any damage.

In *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, an officer conducting a traffic stop asked the defendant if he "'had any drugs in the vehicle'" and asked whether he could search the car "'for drugs.'" (*Id*. at p. 1407.) The defendant denied having drugs, and gave consent to search the car. (*Ibid*.) In searching the interior of the car, the officer noticed that a "'screw that was securing the plastic vent to the door post has striation marks, [and] that in [his] opinion the screw had been worked and tampered with recently.'" (*Ibid*.) The officer used a screwdriver to remove the vent from the door post and found drugs and a gun inside the post. (*Id.* at p. 1408.) The officer never sought permission to remove the door vent. (*Ibid*.) The court in *Crenshaw* concluded that the officer's disassembly of the post was objectively reasonable and that the defendant's "consent to search the car for drugs, under these facts, included consent to remove the door vent and search the door panel which might reasonably hold drugs." (*Id*. at p. 1415.)

Defendant seeks to distinguish *People v. Crenshaw, supra,* 9 Cal.App.4th 1403, arguing that Sergeant Gutierrez did not testify that it appeared as if someone had tampered with the car. This is of no significance to the propriety of the search here (see, *People v. Baker, supra,* 164 Cal.App.4th at p. 1158; *People v. Cantor, supra,* 149 Cal.App.4th at p. 965), nor does defendant cite any authority holding that it is. In any event, Sergeant Gutierrez testified that the position of the lodged registration form indicated "recent use" of the glove compartment, and when he pulled out the registration form, he noticed the little plastic panel in the back of the glove compartment was loose. That testimony supports a reasonable inference that the car appeared to have been "tampered with." (*People v. Crenshaw, supra,* 9 Cal.App.4th at p. 1407.)

Defendant argues that unlike the defendant in *People v. Crenshaw, supra,* 9 Cal.App.4th 1403, he "would not have had any reason to think he was consenting to an inquiry that was narrowly focused on drugs." Sergeant Gutierrez, defendant maintains, only "mentioned narcotics," and "the nature of [Sergeant Gutierrez's] interaction with [defendant] did not suggest that the search was focused specifically on drugs." We disagree. Sergeant Gutierrez specifically asked defendant "if he had anything illegal in the car, narcotics, weapons," and defendant replied that "he did not. Go ahead and search, there shouldn't be anything in there." The nature of Sergeant Gutierrez's interaction with defendant suggested that the search included a search for drugs. As in *Crenshaw,* the search behind the pull-off panel at the back of the glove compartment was objectively reasonable given that the defendant, at the time of his consent, "knew the object of the officer's search, to wit, drugs," and made no objection as the search took place. (*Id.* at p. 1415.)

Defendant argues that although Sergeant Gutierrez inquired whether defendant had "anything illegal," that statement did not suggest the search was focused on drugs. But Sergeant Gutierrez specifically inquired whether defendant had "narcotics" in the car. A reasonable person would have understood that the consent to search included a search for drugs.

Defendant also cites to *People v. Cantor*, *supra*, 149 Cal.App.4th 961 in support of his proposition that he would not have had any reason to think he was consenting to an inquiry that was narrowly focused on drugs. In *Cantor*, during a traffic stop, the officer detected the odor of marijuana on the defendant's person as the defendant stepped out of the vehicle. The officer therefore asked the defendant if he had been smoking some "weed;" the defendant said he had not, and did not respond and appeared nervous when asked if someone had been smoking it around him. (*Id*. at p. 963.) The officer then asked the defendant, "Nothing illegal in the car or anything like that? Mind if I check real quick and get you on your way?" The defendant answered, "yeah." (*Id*. at p. 964.) The officer conducted an exhaustive search of the car and found no contraband. About 15 minutes after the defendant gave his consent to search, the officer told the defendant that he was going to have a police dog come out to sniff the car. While waiting for the dog to arrive, the officer used a screwdriver to remove a panel from a small mechanical device that he found in the defendant's trunk. The officer found a paper bag containing cocaine. (*People v. Cantor*, *supra*, 149 Cal.App.4th at pp. 963, 964.)

The court in *People v. Cantor*, *supra*, 149 Cal.App.4th 961, concluded that the search exceeded the boundaries of the defendant's consent under the Fourth Amendment. The court held that a reasonable person would not have understood the defendant's consent to a "real quick" search to include authorization for a prolonged search which included unscrewing a panel on a piece of equipment during a second search of the trunk. (*Id.* at pp. 965-966.) Here, defendant did not limit his consent to a "real quick" search, nor did Sergeant Gutierrez utilize a screwdriver or other tool to open a sealed container. The panel at issue here was easily removed and replaced with no apparent damage to the car.

The court in *People v. Cantor*, *supra*, 149 Cal.App.4th 961, noted that under the circumstances, "the officer in this case did not notify defendant of the object of his search, making it difficult to impute to defendant consent to search any container within the car that might contain such object." (*Id.* at p. 967.) In *Cantor*, however, the officer merely asked the defendant if he had been "smoking weed" and then asked if defendant

had anything illegal in the car. (*Id.* at p. 964.) In this case, defendant consented to a search when Sergeant Gutierrez specifically asked him if he had any narcotics or weapons in the car. Therefore, it was objectively reasonable for the trial court to conclude the search was for narcotics or weapons.

Defendant asserts that the scope of the search "did not justify an unlimited disassembly of the vehicle," particularly since he made it known to Sergeant Gutierrez that the car belonged to his sister. Defendant relies upon several cases which hold that the search of property belonging to another is improper: *People v. Cruz* (1964) 61 Cal.2d 861 [improper to spend hours searching through property belonging to others based upon consent to "look around" apartment]; *United States v. Jaras* (5th Cir. 1996) 86 F.3d 383 [notwithstanding the driver's consent to search the car, it was improper to search another person's suitcase located in the trunk of the car]; *United States v. Infante-Ruiz* (1st Cir. 1994) 13 F.3d 498 [notwithstanding the driver's consent to search the car, it was improper to search another person's briefcase located inside a locked trunk of the car]; *United States v. Ibarra* (5th Cir, 1992) 965 F.2d 1354 [search by using a sledge hammer to break forcibly the boards that sealed the access route to the attic of a house owned by another].[2]

The cases cited by defendant, including *People v. Cruz, supra,* 61 Cal.2d 861, are inapposite. Here, the consent to search was not merely limited to a "look around." Also, the search did not require the unlocking of the item searched, nor was it a prolonged search, or one that required the use of a "sledge hammer" to open the item by force. Within seconds, and without the use of any tools, Sergeant Gutierrez merely popped off the small, loose plastic panel covering the back of the glove compartment. In *People v. Cantor, supra,* 149 Cal.App.4th 961, relied upon by defendant, the court found significant, in determining the scope of the search, whether the search was of a locked or

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[2] We, of course, "are not bound to follow federal circuit or district court decisions. (*Choate v. County of Orange* (2000) 86 Cal. App. 4th 312, 327-328, *citing Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, 181.)

sealed container inside a car. (*Id*. at p. 967.) "In our view, unscrewing the back panel of the record-cleaning machine is more akin to the prying open of a locked briefcase . . . ." (*Id*. at p. 966; *Florida v. Jimeno, supra*, 500 U.S. 248, 251-252 ["It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk . . ."].) As noted by the court in *Cantor* "'a crucial concern underlying fourth amendment jurisprudence [is] the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.' [(*State v.*] *Wells* [(Fla. 1989)] 539 So.2d [464,] 467 (*Wells*), fn. omitted.) *Wells* 'decline[d] to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located,' noting that '[t]his would render the very act of locking or sealing the container meaningless' and ignore the defendant's expectation of privacy. (*Ibid*.)" (*People v. Cantor*, *supra*, 149 Cal.App.4th at p. 967.)

Moreover, unlike the cases relied upon by defendant here, it appeared that the area searched had recently been used, and defendant testified that he had used it. At the time of the traffic stop, the car registration "was lodged in between the back of the glove box and like a subwall or a fire wall area," indicating to Sergeant Gutierrez that the glove compartment had been used recently. In addition, defendant accessed the glove compartment at the time of the traffic stop in an attempt to obtain the car registration, and the glove compartment remained open throughout the search. Defendant had placed papers in the glove compartment, including the car registration, and defendant placed income tax papers in it at least six months prior to the search. Defendant used the car two to three times per week. Thus, defendant and the owner of the car "mutually used the property searched and had joint access to and control of it for most purposes, so that it is reasonable to recognize that either user had the right to permit inspection of the property and that the complaining [owner of the car] assumed the risk that the consenting co-user might permit the search." (*United States v. Rizk* (5th Cir., 1988) 842 F.2d 111, 112-13 (*per curiam*), cert. denied (1988) 488 U.S. 832 [109 S.Ct. 90, 102 L.Ed.2d 66].)

Defendant contends that a reasonable person would not have known that the particular model of Lexus defendant was driving had a factory compartment behind the glove compartment where narcotics can be stored. Sergeant Gutierrez testified that he knew of the compartment and that it could be a place for the storage of narcotics. Defendant argues, therefore, that it was not objectively reasonable that the search consent would include the "disassembly" of internal vehicle components. Even without such special knowledge, however, a reasonable person would know that the search was for drugs, and since the compartment behind the glove compartment did not require "disassembly," particularly because the glove compartment was open throughout the search, it was reasonable to know the scope of the search included that compartment. "No reasonable person would expect narcotics to be scattered loosely throughout the vehicle." (*People v. Crenshaw*, *supra*, 9 Cal.App.4th at p. 1415.) We, therefore, hold that the scope of the search was objectively reasonable.

II. In Camera Review

During the hearing on defendant's motion to suppress evidence, the trial court held an in camera hearing regarding Sergeant Gutierrez's assertion that certain information was privileged under Evidence Code, sections 1040 and 1041. Following that in camera review, the trial court ruled that the information was privileged. Defendant requests that we conduct an independent review of the in camera proceedings to determine whether his due process rights were protected.

A. Standard of Review

We review for abuse of discretion a trial court's determination of the materiality of evidence for purposes of the sections 1040 and 1041 privilege. (*People v. Hobbs* (1994) 7 Cal.4th 948, 971; *People v. Walker* (1991) 230 Cal.App.3d 230, 237-238.)

B. Background

At the hearing on defendant's motion to suppress evidence, Sergeant Gutierrez testified about the facts concerning his search of the vehicle. Sergeant Gutierrez asserted privilege protection under Evidence Code, sections 1040 and 1041, in response to the question of "[W]hat was the most recent information you had [before stopping defendant, that defendant was involved in any type of illegal activity]?" The trial court interrupted the hearing on defendant's motion to suppress evidence, and held an in camera hearing regarding Sergeant Gutierrez's claim of privilege protection under Evidence Code, sections 1040 and 1041. Before the in camera hearing, the trial court invited defendant's counsel to formulate any questions he wanted the trial court to ask Sergeant Gutierrez. The transcript of the in camera hearing was sealed.

After the in camera review, the trial court inquired whether defendant's counsel had any questions he wanted the trial court to pose to Sergeant Gutierrez regarding his claim of privilege. Defendant's counsel had only one question: "[W]as there confidential information given to [Sergeant Gutierrez]?" In response, the trial court stated that the question had already been asked at length during the in camera hearing.

The trial court concluded that the information sought was not material and upheld Sergeant Gutierrez's assertion of privilege. The trial court stated, "the revelation of the information would in no way assist the defendant. Quite the contrary. [¶] So there is no information in possession of the officer that would be exculpatory to the defendant, or mitigate any sentence, or anything of that nature."

After resuming the hearing on defendant's motion to suppress, defendant's counsel asked Sergeant Gutierrez the following questions: (1) "Did you have any information that caused you to be looking for [defendant's] vehicle at that time?" and (2) "Did you have some information from some source there might be narcotics in that car?" The trial court ruled that the requested information was protected from disclosure on the basis of privilege protection under Evidence Code, sections 1040 and 1041.

C. Legal Principles

Evidence Code section 1040[3] provides a privilege against public disclosure of official information. Official information is "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) Similarly, Evidence Code section 1041[4] provides a privilege against public disclosure of the identity of confidential informants. Public entities have a privilege to refuse to disclose official information, and the identity of a confidential informant, if such disclosure "is against the public interest because there is a necessity for preserving the confidentiality . . . that outweighs the necessity for disclosure in the interest of justice . . . ." (Evid. Code, §§ 1040, subd. (b)(2), and 1041, subd. (a)(2).)

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[3] Evidence Code section 1040 provides in part: "(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. [¶] (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and . . . [¶] . . . [¶] (2) [d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. . . ." (Evid. Code, § 1040.)

[4] Evidence Code section 1041 provides in part: "(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and . . . [¶] . . . [¶] (2) [d]isclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; . . . [¶] (b) This section applies only if the information is furnished in confidence by the informer to: [¶] (1) [a] law enforcement officer. . . ." (Evid. Code, § 1041.)

Evidence Code section 1042, subdivision (a) provides that when a claim of privilege under Evidence Code sections 1040 or 1041 is sustained in a criminal proceeding, the trial court is to "make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material." "[B]y its plain terms, [Evidence Code] section 1042 does not require an adverse order or finding whenever [the privileged information] is relevant. It requires such measures only when the [information] is material. '[T]he test of materiality is not simple relevance; it is whether the nondisclosure might deprive defendant of his or her due process right to a fair trial. [Citation.]'" (*People v. Lewis* (2009) 172 Cal.App.4th 1426, 1441, quoting *People v. Garza* (1995) 32 Cal.App.4th 148, 153; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814 ["an adverse finding is only required [under Evidence Code section 1042, subdivision (a)] if the privileged information is *material*"].) With respect to materiality, the defendant has "the burden of showing that in view of the evidence, there was a reasonable possibility that the [privileged information] could constitute material evidence on the issue of guilt which would result in his exoneration." (*People v. Walker*, *supra*, 230 Cal.App.3d at p. 238.)

In the case of the identity of an informant, the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant. (*Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851.) An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. (*People v. Borunda* (1974) 11 Cal.3d 523, 527.) Mere speculation as to materiality is not sufficient to warrant disclosure. (*People v. Luera* (2001) 86 Cal.App.4th 513, 526.)

We have reviewed the sealed transcript of the in camera hearing during which Sergeant Gutierrez testified under oath. Based on our review of Sergeant Gutierrez's sealed and unsealed testimony, we hold that the evidence at issue came within the privileges set forth in Evidence Code sections 1040 and 1041. We further hold that that

information did not constitute material evidence on the issue of guilt that could result in defendant's exoneration, nor was there a reasonable probability that the informant could give such evidence. The public entity's need to preserve the confidentiality of the information and identity of the informer outweighs any necessity for disclosure in the interest of justice. Moreover, the officer had a valid basis for a traffic stop independent of whatever information he had (see *Whren v. United States* (1996) 517 U.S. 806, 812-813) and the defendant consented to the search. The motive of the officer in making the stop is of no consequence so long as there was probable cause for the traffic stop, which is not disputed. (*Ibid.*) Thus, defendant would not have obtained a more favorable result had the information been disclosed. Accordingly, the trial court did not err in sustaining the privilege under Evidence Code sections 1040 and 1041, and it was not required to make an adverse order or finding under Evidence Code section 1042. (*People v. Lewis*, *supra*, 172 Cal.App.4th at p. 1441; *In re Sergio M.*, *supra*, 13 Cal.App.4th at p. 814.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.